Supreme Court, U. S.
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No. 79-817

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

STUART G. MACKENZIE,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

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September, 1979

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In The Supreme Court of the United States October Term, 1979 No.

STUART G. MACKENZIE, X
Petitioner, X
VS. X
UNITED STATES OF AMERICA, X
Respondent X

* * *

PETITION FOR A WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Stuart G. MacKenzie, hereinafter referred to as Petitioner, and files this his petition for issuance of a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, at New Orleans, Louisiana, pusuant to Rules 19, 21, 22 and 23 of the Supreme Court of the United States and 28 USC 1254 and in support of this petition would respectfully represent and show unto this Honorable Court as follows:

I.
ACTION REQUESTED

Petitioner, Stuart G. MacKenzie, respectfully prays that a Writ of Certiorari issue forthwith to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, entered in this cause on or about August 23, 1979.

II.
OPINION BELOW

Petitioner would show that the opinion of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, dated on or about August 23, 1979, whose judgment is herein sought to be reviewed, is not yet reported in the Federal Reporter; however, a photostatic copy of such opinion and judgment is appended hereto as Appendix A.

III.
JURISDICTION

The judgment of the Court below, namely the United States Court of Appeals for the Fifth Circuit, reference Appendix A, was entered on or about August 23, 1979. Rehearing was not sought. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1).

IV.
QUESTIONS PRESENTED FOR REVIEW

1. Does the provision of 28 USC 2255 providing for collateral attack upon a conviction, deny a probationer faced with revocation of same, from asserting his absolute defense

that the information upon which he was convicted does not state a cognizable offense under the laws of the United States?

2. Does a citizen who is granted probation lose his basic Fifth Amendment rights against self incrimination to be advised of his **Miranda** warnings before being interrogated by his probation officer, solely for the purpose of obtaining incriminating statements when the probation officer not only suspects the commission of a crime, but believes with certainty that a crime has been committed by Probationer?

V.
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would respectfully show that this case involves 28 USC 2255 and the Fifth Amendment proscription that citizens not be compelled to be a witness against themselves. Such statute and constitutional amendment are set forth in their entirety and appended hereto as Appendix B.

VI.
STATEMENT OF THE CASE

Petitioner, Stuart G. MacKenzie, a seventy-nine (79) year old physician, pursuant to a plea bargain agreement, plead guilty to an information, filed the day of his plea, alleging a misdemeanor offense of possession of a controlled substance, in violation of 28 USC 841 (a)(1). He was sentenced to a fine of five thousand dollars ($5,000.00) and imprisonment for one (1) year, probated for a period of three (3) years. Petitioner's probation officer filed an application for revocation of probation on or about January 15, 1979, with a probable cause hearing being held on or about January 19, 1979, with an affirmative

finding thereafterwards. Subsequently, on or about February 13, 1979, the United States District Court for the Northern District of Texas held a hearing upon the motion for revocation. After denying Petitioner's motion to dismiss the application for revocation of probation because he had not plead to a cognizable offense under the laws of the United States, Trial Court admitted into evidence probationer's incriminating statements to his probation officer when being interrogated without benefit of his **Miranda** warnings; immediately thereafter Trial Court found that Petitioner had violated the terms of probation, revoked his probation and forthwith sentenced Petitioner to immediate confinement to serve his one year sentence.

Petitioner timely filed his notice of appeal with the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, entering its judgment and opinion on or about August 23, 1979. It is this judgment and opinion that the Petitioner petitions for issuance of a Writ of Certiorari.

VII.
REASONS FOR GRANTING WRIT

A. This case merits review by this Honorable Court on certiorari because the United States Court of Appeals' decision permits the Petitioner to be confined upon correction of an offense that may not be a cognizable and/or valid offense under the laws of the United States. Due process of law, be it procedural or substantive, requires that one lose his liberty only upon a sentence for a valid offense and not upon a mere possibility that an offense has been committed.

B. Further, this case merits review by this Honorable Court on certiorari because the decision of the United States Court of Appeals deprives Petitioner of his basic constitutional right not to be compelled to be a witness against himself because he is on probation.

VIII.
ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

A. Petitioner would show that he entered into a plea agreement with the Government; such plea was entered on the same day as the information was filed; Petitioner and counsel did not previously examine it. Such sentence as imposed by the Trial Court included confinement for one year, probated for a period of three years. The revocation and confinement of Petitioner herein appealed was based upon a purported offense to which he plead guilty, which was clearly not a cognizable and/or valid offense. Petitioner asserts in this petition, contrary to the holding of the United States Court of Appeals, that apart from whether or not he violated the terms of his probation, the sentence he is now serving is based upon a purported offense, which he contends is not a cognizable offense under the laws of the United States. It is the position of the Petitioner that he cannot be revoked to serve a sentence as to an offense which is not an offense under the laws of the United States. The United States Court of Appeals held in the decision of August 23, 1979, that independent of whether or not Petitioner plead guilty to a cognizable offense, his only attack upon a conviction's validity would be through a collateral attack in a separate proceeding under 28 USC 2255. Specificially, such intermediate appellate court held that until the conviction is judicially nullified its underlying validity plays no necessary part in consideration of whether a probated prison term should be continued in view of an alleged violation

of the terms of probation. Such rationale flies in the face of logic because it permits deprivation of life, limb and property without due process of law. Such decision was alone one of policy and not of law based upon logic and precedent.

Possible reliance by the United States Court of Appeals upon the rationale that a probation revocation hearing is not a formal trial with the strict rules of evidence not applying in such proceeding concerning revoking probation has no bearing upon the issue of whether or not Petitioner plead guilty to a cognizable offense. The information to which the Petitioner plead either states an offense or it does not, which is discoverable alone by examination of the information and its comparison with the statute which it allegedly violates. The issue of whether or not one is guilty or innocent of the underlying prosecution is not applicable, but rather the issue here is whether the information asserts an offense; here in the case at bar, Trial Court did not address itself as to whether a valid offense was alleged.

It is acknowledged by Petitioner that revocation of probation is based upon judicial discretion practiced by the Trial Court, akin to the decision initially whether or not Trial Court should impose a probated sentence. Review of revocation of probation by Trial Court would necessarily only be disturbed if there was a clear abuse of discretion; however, that is a collateral and secondary issue because the issue of abuse of discretion is not present when Petitioner in the instant case has plead to no offense at all.

The requirements of 28 USC 2255 that provide for a collateral attack on the validity of a federal conviction fly in the face of judicial economy. It not only enhances but increases multiple hearings to assert it is unfair and unjust to permit a

probated prisoner proved unworthy of probation to remain free from confinement and flies in the face of logic if such probated prisoner has not violated the law. In the instant case when probationer has plead to no cognizable offense Petitioner asserts he should not be required to comply with the terms of probation. If he has not been convicted of a valid offense, there exists no requirement to begin with even if erroneously imposed for him to comply with probation. Hence, there can be no revocation of probation.

Judicial economy, fairness and due process dictate that Trial Court be permitted to litigate and decide whether or not a probationer has plead guilty to a cognizable offense; absent such a decision a citizen may be confined without a valid conviction being the predicate for his confinement and therefore denied of his liberty without due process of law.

B. The United States Court of Appeals asserts that Petitioner is denied his constitutional rights under the Fifth Amendment to be free from being compelled to be a witness against himself because he is a probationer. The simple adjuration was made that **Miranda's** prophylaxis is inapplicable in a probation revocation proceeding. **U.S. v. Johnson**, 455 F2d 932. Such assertion categorizes probationer as a second class citizen, with less rights than an alien who is in the United States illegally but within the jurisdictional confines of any Federal judicial form in any court. The case cited by the United States Court of Appeals rationalizes that **Miranda** does not apply to probation revocation because its injection could be toxic and produce a paresis in the probation process. (Ref. **U.S. v. Johnson**, 455 F2d 932). To ascribe the assertion of Fifth Amendment rights as being the third stage of the dreaded venereal disease, syphillis, amounts to catharsis of thought and insolence to our constitutional father's precepts. If a

constitutional right is to be granted to an alien, should a citizen on probation be afforded nothing less.

IX.
CONCLUSION

The opinion and judgment below affirming revocation of probation of Petitioner is not only unique but a complete departure of decisions of this Honorable Court which require a deprivation of one's liberty be predicated upon a cognizable offense and a valid sentence imposed. Further, the decision below categorized Petitioner herein as a second class citizen when it denied him his rights against self-incrimination because of his probationary status. Self-incrimination is a basic right of our society of ordered liberty. Aliens have this right without question, and to deny an equal application of constitutional rights to a United States citizen alone because he is on probation is to deny him justice and fairness.

WHEREFORE, PREMISES CONSIDERED, Petitioner, Stuart G. MacKenzie, prays that a Writ of Certiorari be granted and issued forthwith to the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and that upon review of the decision and opinion of the United States Court of Appeals for the Fifth Circuit that it be reversed and remanded because of its erroneous findings both upon law and procedure on important, vital constitutional questions which are needed and required to be resolved by this Honorable Court and for such other and further relief to which this Petitioner herein may show himself justly entitled, for which he shall ever pray.

Respectfully submitted,

LAW OFFICES OF JOHN J.C. O'SHEA

BY: _____

1402 Texas Avenue
P.O. Box 2187
Lubbock, Texas 79408

Attorney for Petitioner

STATE OF TEXAS X

COUNTY OF LUBBOCK X

BEFORE ME, the undersigned authority, on this day personally appeared John J.C. O'Shea, known to me to be an attorney admitted to practice before the Supreme Court of the State of Texas, who after being duly sworn upon his oath duly deposes and states as follows:

That he, in accordance with Rule 33 of the United States Supreme Court Rules, has served the following adverse parties at the addresses shown, a single copy of the above and foregoing Petition for a Writ of Certiorari by depositing the same in the U.S. Mail on the 20th day of September, A.D. 1979, with sufficient first class and/or airmail postage affixed thereto and prepaid to the offices of Solicitor General, Wade Hampton McCree, Jr., Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

JOHN J.C. O'SHEA, Affiant

SWORN AND SUBSCRIBED to before me by the said Affiant this the 20th day of September, A.D. 1979.

Patricia Reagan
NOTARY PUBLIC IN AND FOR
LUBBOCK COUNTY, TEXAS

EXHIBIT A
UNITED STATES v. MacKENZIE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Stuart G. MacKENZIE,
Defendant-Appellant.

No. 79-5164
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 23, 1979.

Medical doctor pled guilty to possession of controlled substance and was placed on probation. Subsequently, the United States District Court for the Northern District of Texas, Halbert O. Woodward, Chief Judge, revoked probation, and doctor appealed. The Court of Appeals held that: (1) assertion that indictment to which doctor pled failed to state offense was no defense in probation revocation proceeding; (2) probation officer was not required to give doctor *Miranda* warnings before interrogating him and obtaining admissions that he was practicing medicine without a license and that he lied about

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

such practice in former interviews with probation officer; (3) evidence was sufficient to show that doctor had practiced medicine in violation of probation; and (4) order of Texas Board of Medical Examiners cancelling doctor's license to practice medicine was properly admitted.

Affirmed.

1. Criminal Law 982.9(1)

Even if indictment to which probationer pled guilty failed to state offense, such was no defense in probation revocation proceeding.

2. Criminal Law 982.9(5)

Miranda's prophylaxis is inapplicable in a probation revocation proceeding.

3. Criminal Law 982.9(5)

In probation revocation proceeding involving doctor who had pled guilty to possession of controlled substance, evidence adduced was sufficient to prove that doctor practiced medicine in violation of probation.

4. Criminal Law 982.9(5)

Enough evidence to satisfy district judge that conduct of probationer has not met conditions of probation is all that is required in probation revocation proceeding.

5. Criminal Law 982.9(5)

In probation revocation proceeding involving doctor who had pled guilty to possession of controlled substance, order of Texas Board of Medical Examiners cancelling doctor's license to practice medicine was properly admitted. Fed. Rules Evid. rule 902(1), 28 U.S.C.A.

— — — — — —

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH, CLARK and VANCE, Circuit Judges.

PER CURIAM:

Stuart G. MacKenzie, a 79-year-old medical doctor, pled guilty to possession of a controlled substance in violation of 21 U.S.C.A. § 841(a)(1). Pursuant to a plea bargain he was sentenced to pay a $5,000 fine and to be imprisoned for one year. The sentence of imprisonment was suspended and MacKenzie was placed on probation for three years on special conditions which included a grant of full access to MacKenzie's home office and records to detect future drug violations.

Within nine months of sentence MacKenzie's probation officer alleged that he had violated probation by practicing medicine after his license to practice had been cancelled by the Texas State Board of Medical Examiners and by making three false statements to his probation officer denying he was practicing medicine. After a plenary hearing the district court revoked MacKenzie's probation. He appeals from that revocation asserting four technical errors, each of which is without merit.

[1] First, MacKenzie asserts that the indictment to which he pled fails to state an offense. That is no defense in a probation revocation proceeding. *United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975).

[2] Second, MacKenzie asserts that the probation officer was required to give him *Miranda* warnings before interrogating him and obtaining admissions that he was practicing medicine without a license and had lied about such practice in former interviews with the probation officer. *Miranda's* prophylaxis is inapplicable in a probation revocation proceeding. *United States v. Johnson*, 455 F.2d 932 (5th Cir. 1972).

[3, 4] Third, MacKenzie asserts that the evidence

adduced was insuffient to prove beyond a reasonable doubt that he had practiced medicine in violation of his probation. In addition to MacKenzie's own admission the government adduced evidence of patients and drug purchase records. This was more than sufficient to meet the lesser standard of proof applicable. Enough evidence to satisfy the district judge that the conduct of probationer has not met the conditions of probation is all that is required. *United States v. Garza*, 484 F.2d 88, 89 (5th Cir. 1973).

[5] Finally, MacKenzie asserts that the order of the Texas Board of Medical Examiners cancelling his license to practice medicine was improperly admitted. In this revocation proceeding relaxed evidentiary rules apply, but the proof offered clearly met the requirement of Federal Rule of Evidence 902(1).

AFFIRMED.

EXHIBIT B

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the

court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.

AMENDMENT [V] TO THE U.S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.